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 14 U.S. SMALL BUSINESS  
 15 ADMINISTRATION, as Receiver for  
 PROSPERO VENTURES, L.P.,

16 Plaintiff,

17 v.

18 DONALD K. EMERY,

19 Defendant.

20 NO. C 07-03741 VRW

21 **Related Cases:**

22 C 07-03732, C 07-03733, C 07-03735,  
 C 07-03736, C 07-03737, C 07-03738,  
 C 07-03739, C 07-03740

23  
**MEMORANDUM OF POINTS AND  
 AUTHORITIES IN REPLY TO  
 DEFENDANT'S OPPOSITION TO  
 PLAINTIFF'S MOTION TO STRIKE  
 AFFIRMATIVE DEFENSES  
 (FRCP 12(f)); ALTERNATIVELY,  
 MOTION FOR JUDGMENT ON THE  
 PLEADINGS (FRCP 12(c))**

24 Date: June 5, 2008

25 Time: 2:30 p.m.

Ctrm: 6, 17<sup>th</sup> Floor

Date Complaint Filed: July 19, 2007  
 Trial Date: Not yet set

26 Plaintiff submits the following Memorandum of Points and Authorities in support of its  
 27 Reply to Defendant's Opposition to Plaintiff's Motion to Strike Affirmative Defenses or in the  
 28 Alternative, Judgment on the Pleadings, as to the sole cause of action alleged herein:

## INTRODUCTION

EMERY raises several affirmative defenses<sup>1</sup> dealing with actions of the Small Business Administration (“SBA”) in capacities other than RECEIVER which took place prior to the Receivership Order. Plaintiff’s position here is clear: each affirmative defenses is barred. EMERY raises three affirmative defenses based on the legality of the Small Business Investment Act of 1958 (the "ACT"). Each should be stricken as the SBA ACT, enacted by Congress, is valid as written. Moreover, EMERY fails to realize that the SBA is not a party to this action but acts solely in the capacity as the RECEIVER appointed by the United States District Court standing in the shoes of PROSPERO.

EMERY does not dispute the defenses arise from activities that occurred prior to the Receivership Order, but contends that the SBA's multiple roles have created a conflict of interest therefore giving him access to affirmative defenses that would otherwise be barred. To reach the conclusion urged by EMERY, one must ignore that Congress has specifically authorized the SBA to act as receiver to Small Business Investment Companies ("SBIC"s). (15 U.S.C. § 687c(c).)

Generally, EMERY contends that the SBA acted improperly by (1) failing to give PROSPERO an opportunity to cure its impairment, (2) breaching its obligations to its fellow limited partners, and (3) putting itself in the position of RECEIVER out of self- interest which EMERY contends is a conflict of interest. EMERY contends it is too early for this Court to decide these claims (Opp., p. 3), but the truth is, ***it is too late to raise them.***

No amount of discovery can change the fact that EMERY cannot, as a matter of law, raise the affirmative defenses outlined in the parties' moving papers. Thus, it is certain that any facts EMERY discovers and presents at a considerable expense to all the parties are irrelevant to this lawsuit. Simply stated, EMERY is dissatisfied with the decisions that the SBA made in its discretionary capacity.

Finally, Plaintiff set forth reasons outlining why each of the affirmative defenses should

<sup>1</sup> The issues raised in the original motion to strike and this opposition are all identical to those in the related cases bearing case numbers: C 07-03732, C 07-03733, C 07-03735, C 07-03736, C 07-03737, C 07-03738, C 07-03739, C 07-03740.

1 be stricken in its motion. In its opposition, no individual responses were presented.

## 2 DISCUSSION

### 3 1. THERE ARE NO MATERIAL DISPUTED FACTS

4 Defendant argues that the motion should be denied because there is a material fact in  
 5 dispute. The appropriate standard is not, however, whether there are any facts in dispute, but  
 6 whether there are any *material facts* that are in dispute. (See *Nevada Power Co. v. Monsanto*  
 7 *Co.*, 955 F.2d 1304, 1306 (9th Cir.1992).)

8 EMERY contends that the motion to strike is improper because he denied committing to  
 9 contribute the sum of \$1,871,287.13. (See Opp., p. 4.) This contention is without merit as  
 10 EMERY states (Answer ¶¶ 8 and 9) that the document speaks for itself. The document speaks  
 11 loud and clear when it states EMERY's capital commitment is \$1,871,287.13; the Agreement<sup>2</sup>  
 12 states this; thus, it must be true. (See Answer ¶¶ 8 and 9.) EMERY also denies breaching the  
 13 Agreement by refusing to pay when a demand was made. (See Opp., p. 4.) EMERY  
 14 acknowledges that a call for capital contribution was made on or about May 9, 2005. (See  
 15 Answer ¶ 13.) At that time, he did not contend that the capital that had been committed was not  
 16 owed; rather, EMERY contends he is otherwise excused from performing due to the SBA's  
 17 wrongful conduct. That EMERY disputes the legal conclusion is not enough. Given that  
 18 EMERY has admitted entering into the Agreement, the Agreement sets forth the capital  
 19 contributed, and EMERY has admitted failing to make the payment for capital despite demand,  
 20 there is no *material issue of fact*.

### 21 2. A MOTION TO STRIKE MAY BE BROUGHT AT ANY TIME TO 22 STRIKE DEFENDANT'S AFFIRMATIVE DEFENSES AS THEY ARE 23 LEGALLY INSUFFICIENT; IT IS NOT PREMATURE

24 EMERY contends that the motion should be denied as it is premature. There is no  
 25 dispute that a plaintiff may properly challenge the *legal sufficiency* of the defenses pleaded in the  
 26 answer *at any time*. (See *Oregon Laborers-Employers Trust Funds v. Pacific Fence & Wire Co.*  
 27 726 F.Supp. 786, 788 (D OR 1989).) EMERY's contention that the motion to strike is premature

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28 <sup>2</sup>The "Agreement" is the Limited Partnership Agreement and was attached to the Complaint as Exhibit "B."

1 and ***thus*** without merit (Opp., p. 5) should be summarily rejected.

2 EMERY asserts that he cannot state the factual basis for his defenses because he has not  
 3 yet been afforded sufficient time to discover the same. (Opp., p. 2-7.) EMERY asserts that if he  
 4 is given the opportunity to conduct discovery, he will discover evidence that the SBA committed  
 5 wrongful acts in failing to provide ***PROSPERO*** an opportunity to cure.

6 More of a defendant is required. (FRCP, Rule 11.) Defendant and counsel must  
 7 investigate all defenses ***before they are alleged*** confirming a good faith basis for the same. As  
 8 EMERY cannot now state facts to support the defense, he should not have alleged the defense;  
 9 thus, the affirmative defenses should be stricken. If facts are later developed during discovery  
 10 that could prove the defense, he can seek leave to amend the answer. The defenses are  
 11 insufficient as a matter of law and are therefore properly stricken at this time.

12 EMERY cites *Limone v. United States*, 271 F.Supp.2d 345, 356 (D. Mass. 2003), for the  
 13 proposition that the motion to strike is premature in a case where the defendant sought the  
 14 discretionary function of his job as a defense. (Opp. p., 12.) In *Limone*, the plaintiffs set forth  
 15 ***specific facts*** accusing the defendants (state and federal officials) of framing him for murder.  
 16 (*Id.* at p. 12.) The officials were alleged to have suborned perjury, fabricated evidence, and  
 17 violated their constitutional duty to disclose exculpatory evidence. (*Ibid.*) Thus, the *Limone*  
 18 court “rejected the discretionary function defenses. . .” (*Ibid.* citing *Tri-State Hosp. Supply*  
 19 *Corp. v. United States*, 142 F.Supp.2d 93, 100-101 (D.D.C.2001) [customs officials did not have  
 20 discretion to lie under oath]; *Merritt v. Shuttle, Inc.*, 13 F.Supp.2d 371, 380 (E.D.N.Y.1998)  
 21 (conspiracy of FAA inspectors to blame pilot for near-crash was not covered by discretionary  
 22 function); see also *Chandler v. United States*, 875 F.Supp. 1250, 1266 (N.D.Tex.1994).)  
 23 EMERY’s reliance on *Limone* is misplaced because the plaintiff there “***alleged facts of a serious***  
 24 ***and malevolent nature*** as to be beyond any reasonable discretion on the part of a Government  
 25 agency. . . ” and ***alleged facts*** “not involv[ing] normal regulatory activities or the weighing of  
 26 policy factors within the scope of proper governmental power, but rather something which goes  
 27 beyond the constitutional powers of the Government, and seriously violates the constitutional  
 28 rights of a citizen.” *Ibid.* EMERY has not alleged ***specific facts***. Rather, EMERY wants to

1 conduct discovery so that he might find some wrongful act.

2 Simply stated, the SBA, acting in its discretionary capacity, made decisions with which  
 3 EMERY disagrees. EMERY has not set forth *specific facts* sufficient to avoid the discretionary  
 4 bar discussed in greater detail in Plaintiff's motion to strike.

5 **3. THE STATUTES AND REGULATIONS THAT EMERY AGREED TO BE  
 6 BOUND BY DEFEAT HIS CLAIMS**

7 **A. The SBA ACT Sets Forth The Requirements of Private Financing.**

8 Under the ACT, the SBA is authorized to license privately owned investment companies with  
 9 sufficient private capital to SBICs. (See 15 U.S.C. §§ 661-687.) The purpose of an SBIC is to  
 10 provide equity capital, long-term loans and management assistance to small business concerns. (See  
 11 15 U.S.C. § 661.) The congressional declaration of policy states that the SBA conducts its business  
 12 "in such a manner as to insure *the maximum* participation of *private financing sources*." (See 15  
 13 U.S.C. § 661, emphasis added.)

14 Private capital, pursuant to the Act, consists of the sum of (i) paid in capital contributed by  
 15 the partners and (ii) *unfunded binding commitments from investors* that meet the criteria  
 16 established by the SBA. (See 15 U.S.C. § 662 (9)(A) (i) and (ii).) Exhibit "A" to the Agreement  
 17 herein reflects that the sum of EMERY's commitment, i.e., the sum of his paid in capital and his  
 18 unfunded binding commitment, was \$1,871,287.13. (See Agreement.) EMERY does not dispute  
 19 that pursuant to statute, an SBIC must maintain a balance between private capital and governmental  
 20 funding. (See 13 C.F.R. 107.1830.)

21 **B. By Investing in an SBIC and by Entering the Agreement with PROSPERO, EMERY  
 22 Consented to the Terms and Conditions Contained Therein and Cannot Now Complain  
 23 About Them.**

24 EMERY, a wealthy and sophisticated investor, knew in advance of entering the Agreement  
 25 agreed that if there was a conflict between the Agreement and the ACT, the provisions of the ACT  
 26 would control. (See ¶¶ 8 and 9; see also ¶ 2.2 of the Agreement as Exh. "B" to the Complaint.)  
 The ACT provides that the SBA may be appointed as the receiver. (See 15 U.S.C. § 687c(c).)

27 EMERY agreed in advance when he executed the Agreement that the SBA would be a *third*  
 28 *party beneficiary* thereto. "[T]he SBA shall be deemed an express third party beneficiary of the

provisions of the Agreement to the extent of the rights of the Preferred Limited Partners and the SBA hereunder and under the Act, and the SBA *shall be entitled to enforce such provisions* (including without limitation, the *obligations of each Partner to make capital contributions to the Partnership for the benefit of the Preferred Limited Partners and for its benefit. . .*) ¶ 2.3, emphasis added.

The Agreement expressly stated that 13 C.F.R. § 107.1140 was incorporated by reference as if fully incorporated. ¶ 2.4 (a). Section 107.1140 states:

“If you issue Leverage after April 25, 1994, you automatically agree to the terms and conditions in §§ 107.1800 through 107.1820 as they exist at the time of issuance. The effect of these terms and conditions is the same as if they were fully incorporated in the terms of your Leverage.”

Section 107.1800 provides:

*“Any Licensee that violates the terms and conditions of its Leverage is subject to SBA remedies. . . . The terms, conditions and remedies in § 107.1820 apply to outstanding Preferred Securities and Participating Securities issued after April 25, 1994, or if you have Earmarked Assets in your portfolio.”* (emphasis added.)

Section 107.1820 provides that the SBA may place a licensee under restricted operations conditions upon the occurrence of any one of eleven conditions as determined by SBA. Subdivision (e). EMERY expressly recognized and agreed in advance not to limit the SBA’s role as a regulator. The Agreement stated that “nothing in this paragraph 2.4 shall be construed to limit the ability or authority of the SBA to exercise its *regulatory authority* over the Partnership as a licensed small business investment company under the SBIC Act.” (See Exh. “B” to Exh. “A” to Complaint, ¶ 2.4 (d).) Having agreed in advance to accept the various roles of the SBA, EMERY cannot now complain that the various roles constituted a conflict of interest. Thus, even if EMERY could, for a moment, walk in the shoes of PROSPERO, PROSPERO (which consented to the receivership) did not believe that the SBA in its various roles had a conflict of interest.

### C. The Appointment of the SBA as Receiver Was Proper.

EMERY does not dispute that PROSPERO was capitally impaired and thus defaulted. (Opp., p. 3; 13 C.F.R. 107.1830.)

“The Administration *shall have authority* to act as trustee or receiver of the licensee. Upon request by the Administration, the court may appoint the Administration to act in such capacity *unless the court*

1                   *deems such appointment inequitable or otherwise inappropriate by*  
 2                   *reason of special circumstances involved.”* (15 U.S.C. § 687c (a)),  
 2                   emphasis added.)

3                   Congress considered that there might be times (special circumstances) when it would not be  
 4                   appropriate to appoint the SBA as Receiver and discussed potential conflicts of interest in drafting  
 5                   the ACT. The mere fact that the SBA might act in of various roles was considered by Congress and  
 6                   was not determined to be, in and of itself, a conflict of interest. (15 U.S.C. § 687d.)

7                   EMERY does not dispute that **PROSPERO** consented to the voluntary assignment of  
 8                   PROSPERO to Receivership. (See 13 C.F.R. §§ 107.1830.) EMERY admits on November 10,  
 9                   2004, he was noticed that PROSPERO had been ordered into RECEIVERSHIP and that the SBA  
 10                  had been appointed as RECEIVER. (See Answer ¶ 12.) Prior to raising the affirmative defenses,  
 11                  no objection was made to the appointment of the SBA as Receiver nor has EMERY or any other  
 12                  party sought to change the receiver to another party. Instead, EMERY wishes to complain about  
 13                  the actions of the SBA in a capacity other than receiver which, as discussed herein, is not permitted.

14                  The rejection of EMERY’s assertion of a conflict of interest should also foreclose his  
 15                  contention that the mere appointment of the SBA allows EMERY to assert defenses that would  
 16                  otherwise only be available to PROSPERO and would only be available prior to the Receivership.  
 17                  (See Opp., 7:17-28.) EMERY provides no legal authority or analysis as to why he should avoid the  
 18                  bar to Pre-Receivership Orders. EMERY argues that *wrongful unspecified actions* that will not be  
 19                  discussed until discovery is conducted by Defendant, caused PROSPERO to fail. Even if this were  
 20                  true (which is denied by Plaintiff), because the various roles of the SBA were proper and  
 21                  permissible, because the various roles were acknowledged and approved by Congress, *because the*  
 22                  *various roles were acknowledged and consented to by PROSPERO and EMERY*, because  
 23                  PROSPERO consented to the Receivership, EMERY’s contentions should be rejected.

#### 24                  D.     The Receiver is Authorized to Make a Capital Call.

25                  In this case, by order of the United States District Court pursuant to 15 U.S.C. §687c,  
 26                  PROSPERO was placed into Receivership. (“Order” attached to RJD as Exhibit “4.”) In so doing,  
 27                  the United States District Court, Northern District took exclusive jurisdiction of PROSPERO.  
 28                  (Order, 1: 18.) The SBA was appointed Receiver by order of this Court based on PROSPERO’s

1 consent. (Order, 1: 21-22, 6:10.) “The Receiver is appointed for the purpose of marshaling and  
 2 liquidating in an orderly manner all of Prospero’s assets and satisfying the claims of creditors  
 3 therefrom in the order of priority as determined by this Court.” (Order, 1:21-23.) The capital call  
 4 was specifically authorized by the court. “All persons and entities owing any obligation or debt to  
 5 PROSPERO, until further ordered by this Court, shall pay all such obligations in accordance with  
 6 the terms thereof to the Receiver and its receipt for such payments shall have the same force and  
 7 effect as if Prospero had received such payments.” (Order, 2: 27- 3:3.)

8           **4.       NONE OF THE AFFIRMATIVE DEFENSES MAY BE RAISED BECAUSE  
                  THEY ASSERT CLAIMS THAT THE SBA, IN A CAPACITY OTHER  
                  THAN RECEIVER, IS RESPONSIBLE, IN WHOLE OR IN PART, FOR  
                  PLAINTIFF’S DAMAGES**

10           EMERY contends that the distinction drawn between regulator and Receiver is artificial.  
 11 (See Opp., 7.) EMERY is, however, wrong.

12           EMERY does not deny that his affirmative defenses focuses on a *pre-Order contention* that  
 13 the SBA, as regulator, should have taken various actions that would have allowed **PROSPERO** to  
 14 avoid the Order. Thus, EMERY’s pre-Order defenses should be stricken as EMERY cannot stand  
 15 in PROSPERO’s shoes. (See *Luckenback v. Laer*, 190 Cal. 395, 212 P. 918, 920 (1923).<sup>3</sup>)

16           The roles of the SBA as regulator and Receiver are not artificial, nor are they difficult to  
 17 understand. (See *U.S. v. Acorn Technology Fund, L.P.*, 429 F.3d 438, 446 (3rd. Cir. 2005).) There  
 18 the court explained that the SBA provides leverage to a limited partnership SBIC “in part buying  
 19 participating securities and becoming a preferred limited partner.” (*Ibid.* citing 15 U.S.C. § 683.)  
 20 The *Acorn* court acknowledged that the SBA had priority payment over the limited partners. (*Ibid.*,  
 21 citing 15 U.S.C. § 683(g)(2).) It is also given that in light of the SBA’s position in the collection of  
 22 information, the SBA has superior information to the limited partners. (*Ibid.*) The *informational*  
 23 advantage is the result of the SBA’s position as *regulator* and not the SBA’s position as an *investor*.  
 24 (*Ibid.*) Any informational advantage that the SBA had was the result of its position as a regulator

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 26  
 27           <sup>3</sup> That the authority is from 1923 and has never been overruled demonstrates the basic nature of this bar.  
 28 Simply stated, a defendant in an action brought by a receiver, may not maintain and action or defense relating to the  
 actions of parties other than the receiver that arose before the appointment of the receiver. (*Ibid.*)

1 and thus could not support a lawsuit. (*Ibid.*)

2 EMERY cites no case law disputing the fact that EMERY is not permitted to raise defenses  
 3 based on conduct that occurred prior to the Order appointing the SBA as Receiver. It is well settled  
 4 that defenses in receivership actions are limited. (See *Eddy v. Lafayette*, 163 U.S. 456, 464 (1986);  
 5 *Acorn, supra.*)

6 A receiver cannot be sued for in respect of acts occurring prior to the receivership. (See  
 7 *State of Oklahoma v. State of Texas*, 265 U.S. 490, 492-493 (1924).) Not only is the appointment  
 8 of the SBA proper, both PROSPERO and EMERY agreed to the appointment of the SBA as  
 9 RECEIVER in advance.

10 EMERY finds no support in case law where the SBA is the receiver for his position. To the  
 11 contrary, EMERY cites cases dealing with private receiverships which operate under a different set  
 12 of rules. EMERY contends the SBA is unlike a typical receiver in that the SBA “caused the  
 13 company to go into receivership and caused the debt for which the receiver now asserts a claim.”  
 14 (Opp., p. 8.) EMERY then contradicts this contention when he admits that the SBA did not cause  
 15 the impairment and that PROSPERO’s failures was the result of the burst of the high technology  
 16 bubble. (See Opp., p. 2.)

17 EMERY cites case law for receivers outside of the context of the SBA ACT. Such an  
 18 argument might apply if PROSPERO did obtain an SBIC license from the SBA, but, having decided  
 19 to do so, PROSPERO is obligated to follow the rules set forth by the ACT and the regulations set  
 20 forth by the statutes including the rule which puts the SBA as creditor in a primary position.  
 21 EMERY is bound by his Agreement to do the same. EMERY, after committing his capital  
 22 contribution cannot now cry foul because the business failed.

23 EMERY cites several non-SBIC cases for support of his position that a receiver may not  
 24 serve dual roles, but this ignores the statutory and contractual provisions (See Agreement) that  
 25 permit such where a SBIC is involved. In a private company, i.e., not an SBIC, it is true that the  
 26 court stated:

27 “It is a rule of general application that a receiver should be a person  
 28 wholly impartial and indifferent toward all parties interested in the  
 fund or property to be administered and generally speaking, officers

1 and directors of a corporation involved in insolvency should not be  
 2 appointed to the position. Although this rule is not inflexible, it  
 3 should be observed where such officers or directors have by their ***bad  
     management contributed to the insolvency.***" (*Coy v. Title  
     Guarantee & Trust Co*, 157 F. 794, 796-797 (D. Ore. 1907).)

4 Here, neither the rule nor the logic of *Coy* applies. First, as noted above, PROSPERO and  
 5 EMERY agreed to allow the SBA to serve as regulator, special limited partner and receiver if  
 6 PROSPERO failed. Second, and more importantly, SBA never managed the business and thus could  
 7 not have caused the business to fail.

8 EMERY also cites *Laube v. Seattle Taxicab Co.*, 132 Wash. 32 (1924), another private  
 9 company which was not an SBIC which stated as follows: "no party or attorney or other person  
 10 interested in an action shall be appointed receiver therein,' the wisdom of which is manifest in this  
 11 case where the trustee is seeking to recover judgment against one who denies the alleged  
 12 indebtedness." It is, however, inapplicable here. Moreover, the general policy of resolving issues  
 13 on the merits is not implicated. Here, the affirmative defenses are insufficient ***as a matter of law.***  
 14 (See *Kaiser & Chemical Sales, Inc. v. Avondale Shipyards, Inc.* 677 F.2d 1045, 1057 (5<sup>th</sup> Cir. 1982).)

15 EMERY provides no legal authority for the proposition that the SBA's mere appointment  
 16 ***as Receiver*** constitutes a conflict of interest because there is no such authority on that point. To the  
 17 contrary, EMERY consented to the appointment of the SBA pursuant to 13 C.F.R. § 107.1830  
 18 (g)(c)(2), and PROSPERO, the real party in interest if it contended the SBA acted improperly when  
 19 it placed PROSPERO into receivership, stipulated to the appointment of the SBA as receiver.

20 **5. THE DISCRETIONARY FUNCTION OF THE SBA BARS EACH OF THE  
     AFFIRMATIVE DEFENSES**

21 The SBA is not a party to this action; rather, the SBA acts solely as the Receiver standing in  
 22 the shoes of PROSPERO. Assuming for the sake of argument that there is any defense available to  
 23 EMERY here based on the pre-receivership conduct of the SBA, EMERY was obligated to assert  
 24 any claims by the Claims Bar Date in a manner similar to preserving an FDIC offset.

25 EMERY contends that the Federal Torts Claims Act (FTCA) prevents only the bringing  
 26 of claims against the government based on discretionary conduct, but does not bar the affirmative  
 27 defenses raised because they are not claims against the SBA. (See Opp., p. 11.) EMERY could  
 28

1 have, but did not, preserve these issues by the Claims Bar Date. On November 10, 2004, EMERY  
 2 was notified that the Receivership Court will enter its Order thereby establishing a Claims Bar Date.  
 3 The purpose of the Claims Bar Date is to give notice to all potential litigants that they must assert  
 4 any potential claims by a certain date.

5 EMERY contends that even if it is equitable to deny a right or defense to someone who has  
 6 committed a misdeed, “there is little reason to impose the same punishment on a trustee, receiver or  
 7 similar **innocent party** that steps into the party’s shoes pursuant to a court order or operation of  
 8 law.” (Opp., p. 10, lines 6-7, emphasis in original.) EMERY contends that in *FDIC v. Gladstone*,  
 9 44 F.Supp.2d 81, 88 (D. Mass. 1999), the discretionary function of the FTCA does not bar  
 10 affirmative defenses. The case cited actually discussed whether, after the case of *O’Melveny &*  
 11 *Myers v. FDIC*, 512 U.S. 79 (1994), **common law federal affirmative defenses are available**, not  
 12 whether claims could be brought against the receiver for pre-receivership actions of another party  
 13 (e.g., the FDIC as regulator and receiver). (*Id.* at p. 86.)

14 Prior to *O’Melveny & Myers v. FDIC*, the FDIC, in acting as receiver for a failed bank, sued  
 15 the law firm of O’Melveny & Myers, alleging professional negligence and breach of fiduciary duty  
 16 in its representation of the bank. (*Ibid.*) The Ninth Circuit held that federal common law governed  
 17 questions such as whether knowledge can be used as the basis of an estoppel defense against the  
 18 FDIC as receiver. (*Ibid.*) The Supreme Court reversed holding that with rare exceptions, “there is  
 19 no federal general common law.” (*Ibid.*)

20 Here, EMERY incorrectly assumes that he has the ability to **step into the shoes of**  
 21 **PROSPERO**. The reverse is true! The RECEIVER stands in the shoes of PROSPERO. The SBA  
 22 is not a party to the action. Further, unlike the litigants in the above cited case, EMERY is not an  
 23 innocent party; rather, he is a sophisticated and wealthy investor who personally entered into a  
 24 contractual relationship by entering the Agreement expressly consented to the fact that the SBA was  
 25 the third party beneficiary and agreeing to make the capital contribution if the call was made. The  
 26 above holding, therefore, does not apply to these facts. Given that EMERY’s argument relies upon  
 27 this false premise, the entire argument falls.

28 In another FDIC case, *RTC*, the appellants, attempted to raise counterclaims (past the Claims

1 Bar Date) asserting several grounds including lack of actual notice of the claims bar date. (See *RTC  
2 Mortg. Trust 1994-N2 v. Haith*, 133 F.3d 574 (8<sup>th</sup> Cir. 1998.) The lower court found inquiry notice  
3 existed and barred such claims. (*Ibid.*)

4 The distinctions raised by plaintiff between a receiver's management role and pre-  
5 receivership claims are not "contortions" of facts, but are well established means of analyzing  
6 whether a claim is barred or not under the FDIC as cited by EMERY. The Tenth Circuit held that  
7 the limitation on judicial review set forth in § 1821(d)(13)(D) does not apply to claims arising from  
8 **management actions**. (See *Homeland Stores, Inc. v. RTC*, 17 F.3d 1269 (10th Cir. 1994), cert.  
9 denied, 513 U.S. 928 (1994).) The First Circuit has stated that the FDIC has implicitly interpreted  
10 § 1821(d)(5)(C)(ii), to permit **claimants who did not receive notice of the receiver's appointment**  
11 to file after the deadline to file claims that not arise until after the deadline. (See *Heno v. FDIC*, 20  
12 F.3d 1204, 1208-10 (1st Cir. 1994).) The FDIC has interpreted § 1821(d)(13)(D) to require  
13 exhaustion of administrative remedies for both pre-receivership and post-bar date claims. (See *RTC  
14 Mortg. Trust 1994-N2 v. Haith, supra*, at 579.)

15 In RTC, the case was remanded

16 "for a determination of whether the counterclaims are based on  
17 **pre-receivership conduct** of the failed financial institution or whether  
18 they are based at least in part on **post-receivership conduct of the  
19 RTC in the management of the financial institution's assets**. If the  
20 court concludes that the claims arise under the second category, the  
21 district court must determine whether FIRREA, as interpreted by the  
RTC in its own internal manual procedures, requires or permits those  
claims to be first examined under the administrative review process.  
If the claims are pre-receivership claims or had their genesis in  
pre-receivership conduct, then the claims must be denied." (133 F.3d  
574, 579, emphasis added.)

22 An analysis of bankruptcy claims is also instructive as the procedures employed in  
23 bankruptcy matters is similar to the claims procedure in this receivership. In a bankruptcy action,  
24 a creditor must submit proof of a claim of debt when a bankruptcy has been filed by the Claims Bar  
25 Date. (See 11 U.S.C. § 533 (a).) Failure to do so bars their claims. (*Ibid.*)

26 Many circuits permit an **offset** of claims but only if a claim is timely submitted. (See *In re  
27 De Laurentis Entertainment Group, Inc. v. National Broadcasting Co.*, 963 F.2d 1269 (9<sup>th</sup> Cir.  
28 1992). Here, the same cannot be said. **EMERY did not take any steps to preserve his rights**. He

1 had actual notice of the receivership; he had actual notice that the SBA was appointed as the  
 2 receiver; and he had actual notice of the Claims Bar Date; yet, he did nothing to preserve his claims  
 3 regarding conduct that is otherwise barred.

4       **6. DESPITE PLAINTIFF'S SPECIFIC CHALLENGES TO EACH OF EMERY'S**  
 5       **AFFIRMATIVE DEFENSES, EMERY RESPONDS ONLY IN THE MOST**  
      **GENERAL TERMS**

6       EMERY provides no individual response to any of Plaintiff's arguments as to the sufficiency  
 7 of each of the affirmative defenses. Instead, he makes the bald assertion that the affirmative  
 8 defenses, as plead, are sufficient to give notice without answering any specific challenges. (See  
 9 Opp., pp. 13-15.) Plaintiff previously stated that the only fact alleged here is that the SBA "fail[ed]  
 10 to provide **PROSPERO** an opportunity to cure" and that the only time frame during which an  
 11 opportunity to cure could have been granted or not provided was **prior** to the Order for Receivership.

12      **A. Covenant of Good Faith and Fair Dealing.**

13      **PROSPERO** could not have been denied an opportunity to cure its capital impairment  
 14 **prior to the Order for Receivership.** The Receiver has no liability for any actions prior to the  
 15 Receivership Order. (See *Eddy v. Lafayette*, supra, U.S. at p. 464; *Ledbetter v. Farmers Bank &*

16 *Trust Co.*, 142 F.2d 147, 149 (1944).) Even assuming that the SBA's actions could be examined,  
 17 it has long been the law that a Receiver is **merely the minister** of a corporation acting at the  
 18 direction of the court to enforce liabilities. (See *Luckenback v. Laer*, supra, 212 P. at 920.)

19      EMERY did not respond to the argument that EMERY, by making a **post-order claim**  
 20 against the Receiver, must provide some **facts** that the Receiver committed some action that  
 21 deprived him of the benefit of the Agreement. (See *Seaman's Direct Buying Service, Inc. v.*  
 22 *Standard Oil Co.*, 36 Cal.3d 752, 768 (1984).) EMERY failed to allege a fact explaining how he  
 23 has been deprived the benefit of his bargain. (See Opp., pp. 1-15.) This affirmative defenses  
 24 should be stricken (FRCP 12(f)) or judgment in favor of the Plaintiff entered. (FRCP 12(c).)

25      **B. Equitable Defenses.**

26      EMERY raises three equitable defenses: (1) bad faith and with unclean hands; (2) detrimental  
 27 reliance; and (3) estoppel. EMERY provides no legal authority to support the notion that this Court  
 28 should depart from the well-settled rule barring equitable defenses from a breach of Agreement. (See

1       *Stop Loss Ins. Brokers, Inc. v. Brown & Toland Medical Group*, 143 Cal.App.4th 1036, 1044  
 2 (2006).)

3           As to each individual defense, ***no facts*** were provided as to what information was relied on  
 4 by EMERY to his detriment; ***no facts*** demonstrated how Plaintiff acted in bad faith; and ***no facts***  
 5 supporting a defense of estoppel. Each of these affirmative defenses should thus be stricken (FRCP  
 6 12(f)) or judgment in favor of the Plaintiff entered. (FRCP 12(c).)

7       **C. Fiduciary Duty.**

8           EMERY concedes that the heart of his claim is that the SBA, ***in its capacity as a regulator***,  
 9 did not allow ***PROSPERO*** an opportunity to cure. The law is clear that these facts are insufficient  
 10 to constitute a breach of fiduciary duty. For these reasons and for the reasons set forth in Plaintiff's  
 11 motion to strike, this affirmative defense should be stricken (FRCP 12(f)), or judgment in favor of  
 12 the Plaintiff entered. (FRCP 12(c).)

13       **D. SBA Regulations.**

14           EMERY contends that the validity of the regulations themselves are applicable to the fifth,  
 15 sixth, and eighth affirmative defenses. (See Opp., 14.) EMERY contends that the SBA has no right  
 16 to enforce its contractual rights against him because the SBA regulations which underpin this  
 17 regulatory scheme are invalid as an unreasonable exercise of power under the Small Business Equity  
 18 Enhancement Act of 1992, 15 U.S.C. § 661 et. seq. (See Opp., p. 14.) In support, EMERY cited  
 19 *Manhattan Gen. Equip Co. v. Comm'n*, 297 U.S. 129, 134 and *Guardians Ass'n v. Civil Service*  
 20 *Com'n of City of New York*, 463 U.S. 582, 614, n.2 (1983). Neither case is applicable to this action.

21           Both *Manhattan* and *Guardians* stand for the proposition that: "The power of an  
 22 administrative officer or board to administer a federal statute and to prescribe rules and regulations  
 23 to that end is not the power to make law, for no such power can be delegated by Congress, but the  
 24 power to adopt regulations to carry into effect the will of Congress as expressed by the statute."  
 25 (*Manhattan Gen. Equip. Co. v. Comm'n*, 297 U.S. 129, 134 (1935); see also *Guardians Ass'n v.*  
 26 *Civil Service Com'n of City of New York*, 463 U.S. 582, 614, n.2 (1983).) Here, the United States  
 27 District Court, with the consent of PROSPERO, following the SBA ACT which was properly  
 28 promulgated by Congress appointed the SBA as a Receiver. EMERY, voluntarily entering into the

1 Agreement, expressly agreed to be bound by SBA ACT and the aforementioned regulations.

2 For the above reasons and as set forth in Plaintiff's motion to strike, the fifth, sixth, and  
3 eighth affirmative defenses should be stricken (FRCP 12(f)), or, alternatively, judgment in favor of  
4 the Plaintiff entered. (FRCP 12(c).)

5 **E. Mitigation of Damages.**

6 EMERY alleges no facts setting forth what actions the Plaintiff could have taken to mitigate  
7 their damages nor does he raise the prospect of being able to allege or prove such facts in the future.  
8 This affirmative defense should be stricken (FRCP 12(f)), or, in the alternative, judgment in favor  
9 of the Plaintiff entered. (FRCP 12 (c).)

10 **F. Ultra Vires.**

11 Ultra vires refers to the fact that a governmental agency has acted beyond its authority. (See  
12 2 Witkin, Cal. Proc. 4th (1997) Jurisd, § 290, p. 861.) As has been discussed, the only allegations  
13 here refer to the actions taken been SBA in its discretionary capacity. No facts support an ultra vires  
14 action. EMERY alleges no facts setting forth what actions on the part of Plaintiff could conceivably  
15 fall under this category. This affirmative defense should be stricken (FRCP 12(f)), or, in the  
16 alternative, judgment in favor of the Plaintiff entered. (FRCP 12(c).)

17 **CONCLUSION**

18 For the foregoing reasons, Plaintiff respectfully requests that the motion to strike be granted,  
19 or alternatively, judgment on the pleadings be entered.

20 Respectfully submitted,

21 Dated: May 2, 2008

COLEMAN & HOROWITT, LLP

23 By: \_\_\_\_\_ /S/  
24 CHRISTINE J. LEVIN  
25 Attorneys for Plaintiff,  
U.S. SMALL BUSINESS  
ADMINISTRATION, as Receiver for  
PROSPERO VENTURES, L.P.

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## **PROOF OF SERVICE**

I declare that I am a citizen of the United States of America and a resident of the County of Fresno. I am over the age of eighteen (18) years and not a party to the within action. My business address is 499 West Shaw, Suite 116, Fresno, California 93704.

On May 2, 2008, I served the foregoing document(s) described as **MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES (FRCP 12(f)); ALTERNATIVELY, MOTION FOR JUDGMENT ON THE PLEADINGS (FRCP 12(c)** on the interested parties, addressed as stated on the attached service list.

- BY MAIL - by placing [x] a true and correct copy [] the original thereof enclosed in a sealed envelope with postage thereon fully prepaid in the firm's outgoing mail. I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. It is deposited with United States Postal Service on that same day in the ordinary course of business.
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  - FEDERAL: I declare that I am employed in the office of a member of the bar of this court at whose direction service was made.

Executed on May 2, 2008, at Fresno, California.

Lisa R. Barr /S/

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